

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 291 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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SHRI CHEMICAL CORPORATION

Versus

MIRABEN PRAFULBHAI CONTRACTOR  
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Appearance:

MR JR NANAVATI with MR AR THAKKAR for appellants.  
MR SB VAKIL for Respondent.  
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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 08/12/2000

ORAL JUDGEMENT

Heard learned Counsel and perused the record and proceedings.

This is the defendants' First Appeal under Sec.96

of the Code of Civil Procedure directed against the judgment and decree passed by the Addl. Principal Judge, Court No.2, City Civil Court, at Ahmedabad in Civil Suit No.618 of 1981 whereby the suit filed by the plaintiff was decreed. The trial Court has made the following three declarations in favour of the plaintiff:-

- (i) The plaintiff was a partner in the defendant no.1 firm with a share of 10 NP in the profit and loss of the business of the said firm,
- (ii) The plaintiff had retired from the defendant no.1 firm from 31st Dec.1978, and
- (iii) The plaintiff was entitled to rendition of account from 1.10.1978 to 31st Dec.1978 from the defendants.

While decreeing the suit with the declarations as above, the trial Court also ordered that at the time of taking the accounts, the assets of the defendant no.1 firm should also be taken into consideration. Whereas the decree passed by the trial Court is a preliminary decree, the Court also directed the Commissioner for Taking Accounts (CTA) to take the accounts on the lines of Section 48 of the Indian Partnership Act for the period 1.10.1978 to 31.12.1978 taking its base from the balance sheet at Exh.39 dated 30th Sept.1978. The Commissioner for Taking Accounts was also directed to ascertain the value of the assets of the firm as on 31st Dec.1978 and hence the matter was referred to the Commissioner for Taking Accounts for ascertaining the accounts between the parties and to find out the amounts due to the plaintiff from the defendant firm no.1 and/or vice versa. The defendants were directed to file the books of accounts of the relevant period within 15 days and also to file their statements and objections within a week thereafter and that the matter be referred to the Commissioner for Taking Accounts after filing of the statements.

2. The defendant - M/s.Shri Cheimcal Corporation was a registered Partnership Firm at 'Industries House', behind Natraj Cinema, Ashram Road, Ahmedabad. The plaintiff Smt. Miraben Prafulbhai Contractor was one of the partners in this partnership firm along with other partners namely, Shri Sudarshan Tapuria, Smt. Kusum Tapuria, Shri Sevantilal Jivanlal Parekh, and Shri Ramprasad Somani. It may also be pointed out that initially, one M/s.Shyam Investment Private Corporation Ltd. was also one of the partners and the partnership agreement was entered into on 25th Oct.1976 and the

plaintiff Smt.Miraben had 2-1/2 paise share in a rupee in the profit and loss of the said firm. The partnership firm was doing its business at Ahmedabad in "Industries House", and it had also its business at Bombay. M/s.Shyam Investment Private Corporation Ltd. had retired from the partnership firm and thereafter there was a change in the shares of the remaining partners including that of the plaintiff and as per the changes made in the partnership, the plaintiff had 10 NP share in the partnership firm after the retirement of M/s.Shyam Investment Private Corporation Ltd. The plaintiff came with the case that she had invested an amount of Rs.10,000/- in the firm - defendant no.1 towards the capital of the said firm and that the balance sheet had been prepared upto 30th Sept.1978, and she had retired from the defendants partnership firm from 31st Dec.1978. In the balance sheet which was prepared upto 30th Sept.1978, the amount of Rs.10,000/- was shown as credit in her capital account. It was also averred by her that Rs.2,395/- was shown as loss coming to her share. A grievance was raised that after retirement, she had requested for accounts, but no accounts were given on one pretext or the other and hence she filed the present suit seeking the declaration that she had retired from the firm on 31st Dec.1978 and also prayed for the additional rendition of accounts from 1.10.1978 to 31.12.1978 and to give her the amount coming to her share at the rate of 10 NP per rupee and that while taking the accounts, her share in the assets of the firm should also be taken into consideration and she also claimed the interest at the rate of 12% from 31st Dec.1978 on the amount due from the defendants and also for the costs of the suit.

3. The plaintiff's claim in the suit was sought to be traversed by the defendant no.1 through written statement at Exh.24 wherein it was inter alia, contended that the plaintiff had no right to file the suit of the present nature as per the terms of the partnership firm and the plaintiff's husband Prafulbhai Contractor had not acted as per the said terms. It was also averred that said Prafulbhai Contractor was a partner in the sister concern trading Corporation and he had retired from the said concern on 31st Dec.1978; that he had not acted as per the terms and therefore, the plaintiff had no right to file the present suit. It was also contended that the plaintiff had no right to claim any share in any of the assets and/or goodwill of the defendant no.1 firm; while it was admitted that the plaintiff was a partner in the firm of defendant no.1 along with defendants nos.2 to 5 as other partners in the same firm. The execution of the partnership deed on 25th Oct.1976 was also admitted and

it was also admitted that initially M/s.Shyam Investment Corporation was also there in this partnership for which the deed was executed on 25th Oct.1976. It was also admitted that on 11th April 1977, M/s.Shyam Investment Corporation retired and the remaining partners including the plaintiff continued in the said firm and the plaintiff as well as the other partners of the defendant no.1 firm had signed the deed of retirement of M/s.Shyam Investment Corporation. It was also admitted that the balance sheet upto 30th Sept.1978 was prepared and the amount of Rs.10,000/- was shown as credit in the account of the defendant no.1 and that the amount of Rs.2,395/- was shown as the amount of liability to be paid by the plaintiff towards her share on account of loss. It was also admitted by the defendant firm that they were and are ready and willing to settle the accounts with the plaintiff from 1.10.1978 to 31st Dec.1978 with the proviso that the plaintiff had no right to claim any share in the assets of the firm. On the basis of the pleadings of the parties, the trial Court framed the following issues and recorded its findings as mentioned against each of the issues as under:

(1) Whether the defendant In the negative.

proves that the plaintiff has no right to file the suit as contended in para 2 of the written statement?

(2) Whether the defendant In the negative.

proves that the plaintiff has no right to claim share from any of the assets of the defendant no.1 firm as contended in para 5 of the written statement?

(3) Whether the plaintiff In the affirmative.

is entitled to get rendition of account from 1.10.1978 to 30th December 1978 on the basis of her 10 paise share in the partnership firm?

(4) What amount is found To be decided after due and to whom? getting report from

C.T.A.

(5) What decree and order? As per order below.

4. It appears from the pleadings, the impugned judgment and the grounds of appeal that the main controversy is about the plaintiff's right to claim the share in the assets and this controversy hinges around the meaning and interpretation of Clause 14 of Exh.38, i.e. the partnership agreement which is reproduced as under:

"Death, retirement, insolvency or liquidation of any of the partners shall not cause the dissolution of the firm, but the surviving/continuing partners shall carry on the business including the operations of the Bank Accounts of the firm PROVIDED HOWEVER, that if any partner so desires he/she/it will be entitled to retire from the partnership by giving to the other partners one month's notice in writing his/her/its intention of so doing. On such retirement, the retiring partners will be paid the amount standing to his/her/its credit in the capital and the current accounts of the partnership only and nothing by way of goodwill."

According to this Clause, the retiring partner has to be paid the amount standing to his/her/its credit in the capital and the current accounts of the partnership only and nothing by way of goodwill. The argument which has been built up so as to assail the impugned judgment and decree is that whereas in terms of Clause 14, nothing was required to be paid to the retiring partner by way of goodwill, the trial Court while passing the decree could not direct that while taking the accounts, the assets of the defendant no.1 firm should also be taken into consideration because with the exclusion of goodwill to a retiring partner, the assets automatically stand excluded. In other words, when the retiring partner has to get nothing by way of goodwill, he is only entitled to the amount standing to his/her/its credit in the capital and in the current account and there is no question of taking into consideration the assets.

5. In the scheme of the Indian Partnership Act, 1932, Section 32 provides for the retirement of a partner and Section 48 provides for mode of settlement of accounts between partners. However, Section 48 specifically provides for settlement of accounts of the firm after dissolution. In the instant case, there was no question of dissolution of the firm in terms of Clause 14 of the agreement at Exh.38 itself inasmuch as it is

clearly provided in Clause 14 that,

"death, retirement, insolvency or liquidation of any of the partners shall not cause the dissolution of the firm, but the surviving/continuing partners shall carry on the business".

In this view of the matter, there is no question of invoking Section 48 of the Partnership Act in the present case and therefore, this Court finds that the trial Court has given a direction to the Commissioner for Taking Accounts in a guarded manner and with caution when he had directed that while taking the accounts, he has not to follow Section 48 of the Partnership Act, but on the lines of Section 48. To my mind, it was not necessary to refer to Section 48 at all. Even in absence of reference to Section 48, the direction could be given as has been given by the trial Court for the purpose of taking the accounts.

6. So far as the three declarations as have been given by the trial Court that the plaintiff had a share of 10 NP out of one rupee in the profit and loss of the business of the firm and that she had retired from the firm on 31st Dec.1978 and she is entitled to rendition of the accounts from 1.10.1978 to 31st Dec.1978 from the defendant firm, it is found on the basis of the uncontested, rather admitted position that these declarations are unassailable. The only question which remains is as to whether the trial Court could give a direction to take into account the assets of the firm because in Clause 14, nothing was to be given to the retiring partner by way of goodwill. The question therefore arises as to whether the goodwill will also include the assets of the firm? Section 14 of the Partnership Act deals with the property of the firm and the same is reproduced as under:-

"14. The property of the firm.-- Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are

deemed to have been acquired for the firm."

It is the trite law that the partnership property mainly depends on the agreement of the partners and the general rule is applicable subject to the contract between the partners. The expression "property of the firm" refers to partnership property, partnership assets, joint stock, common stock or joint estate denoting all property rights and interests to which the firm, that is, all the partners as such, may be said to be entitled and in this context the assets of a firm may illustratively include benefit of a contract, benefit of lease or renewal of a lease, benefit of licence or quota, lands and buildings, etc. All property rights and interests thrown into common stock at the commencement of the business or specifically added to it or acquired by means of it have to be, prima facie, regarded as property of the firm and therefore the goodwill may not necessarily include the assets. The assets of a partnership firm certainly have a tangible and different meaning than that of the goodwill of the firm and unless a contrary intention appears even if the goodwill is included in the term as the property of the firm, the exclusion of goodwill specifically in the term of the contract would not necessarily take within its fold the other properties or the assets of the firm. The goodwill is an abstract term and intangible, capable of description only, but difficult to be defined. In the case of *Trego v. Hunt*, reported in 1896 AC 7, Lord Macnaghten described goodwill as,

"the advantage which is acquired by a business, beyond the mere value of the capital, stock, fund or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers."

In the case of *Khushal Shah v. Khorshed Banu*, reported in AIR 1970 SC 1147, the Supreme Court found that goodwill of the business of the firm is included in the property of the firm and the goodwill of the firm has been expressly declared to be the property of the firm and therefore, it is clear that the goodwill of a firm is one of the items of the properties of the firm and it necessarily does not include the assets also which also form the property of the firm. Therefore, through Clause 14, in the instant case, when the goodwill was excluded to a retiring partner, it could not mean the exclusion of the rights in the assets as a part of the property of the firm other than the goodwill. Therefore, it is discernible as a principle of law that by way of

agreement if any share in the goodwill is excluded by agreement between the parties, such exclusion would not automatically include the exclusion of the assets. Learned Counsel for the appellant has laid stress on the following part of Clause 14:

"On such retirement, the retiring partners will be paid the amount standing to his/her/its credit in the capital and the current accounts of the partnership only and nothing by way of goodwill".

His contention is that what is to be seen is the items which are included to be paid to the retiring partner as per this Clause and since in the items of inclusion the word, "assets" is not there, the plaintiff could not be held to be entitled to any part of the assets. The part of Clause 14 on which Mr.Nanavati has laid stress does not specifically mentions the word, "assets" in the items which are included but Clause 14 has to be read as a whole and no part of it can be read in isolation. Clause 14 in terms mentions about the exclusion of goodwill only. Nothing except goodwill is excluded and therefore, by exclusion of "goodwill", assets cannot be treated to be automatically excluded. Mr.Nanavati also made reference to Exh.39, i.e. balance sheet, in which the assets have been enumerated in a separate column than the column of capital and fixed assets and his submission is that in the balance sheet the assets are not included in the column of capital. In the opinion of this Court, this argument is of no consequence for the simple reason that what is mentioned in this balance sheet forms the part of the properties of the firm and out of the properties of the firm apart from the items which have been included for payment, what has been excluded is only the goodwill and it has already been held in the earlier part of this order that goodwill by itself does not include assets. To be more precise, if we put in mathematical terms, the property of a firm would include the assets plus goodwill amongst other items and therefore in Clause 14 when it is mentioned that the retiring partner shall not get anything by way of goodwill, it does not mean that the retiring partner will not get anything even out of the assets of the firm and therefore, in the opinion of this Court, the trial Court had rightly passed the direction to take account of the assets of the defendant firm while taking the accounts and in this view of the matter, even if it is found that the reference to Section 48 of the Partnership Act was uncalled for and unwarranted and could be avoided by the trial Court, it does not, in substance, affect the direction as has been given by the trial Court when it



says that the Commissioner for Taking Accounts would take into consideration the accounts of the firm from 1.10.1978 to 31.12.1978 taking its base on the balance sheet at Exh.39 dated 30th Sept.1978 and when the assets are duly mentioned in this document at Exh.39 dated 30th Sept.1978, it does not lead to the exclusion of the assets. The preliminary decree has been correctly passed. This Court finds no merit in the appeal. The appeal is hereby dismissed. The trial Court may proceed to pass the final decree after the report of the Commissioner for Taking Accounts is received as per the order dated 8.1.1982 as expeditiously as possible. Since the matter is as old as of 1981, it is expected that the trial Court will give priority to this matter. In the facts and circumstances of this case, the parties are left to bear their own costs. The record and proceedings be sent back to the concerned Court forthwith.

(M.R. Calla, J.)

Sreeram.